(1) Supreme Court, U.S.
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AND
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No. 07-450

In The

Supreme Court of the United States

NATHANIEL JEROME OTTESEN,

Petitioner,

v.

JAMES R. McDONOUGH, SECRETARY FOR THE FLORIDA DEPARTMENT OF CORRECTIONS AND ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the statute of limitations under 28 U.S.C. § 2244(d) governing the federal habeas corpus claims of state prisoners be equitably tolled where a state prisoner diligently attempts to comply with that statute of limitations but fails to do so because of his attorney's misconduct as has been held by the Second, Third, Fifth, Eighth and Ninth Circuits; or instead is attorney misconduct not a basis for equitable tolling of that statute as has been held by the Seventh and the Eleventh Circuits?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were as in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the final order of the United States Court of Appeals for the Eleventh Circuit denying a Certificate of Appealability in this case.

OPINIONS BELOW

The two unpublished Orders of the United States District Court for the Middle District of Florida dated May 8, 2007 and April 12, 2007, are reprinted in the Appendix at App. 3 and 6, respectively. The Judgment of Conviction and Sentence of the Circuit Court of the Thirteenth Judicial Circuit for Hillsborough County, Florida is reprinted in the Appendix at App. 9. The Motion to Reconsider Order of April 12, 2007 Denying Petitioner Ottesen's Motion to Reopen Case and Incorporated Memorandum of Law filed in the United States District Court for the Middle District of Florida is reprinted in the Appendix at App. 38.

JURISDICTION

The Order of the Eleventh Circuit denying Petitioner's application for a Certificate of Appealability was entered on July 2, 2007. (App. 1). This petition for a writ of certiorari is filed within ninety days of that date as required by Supreme Court Rule 13.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. This Court has jurisdiction to review a final order of a United States Court of Appeals denying a certificate of appealability. *Hohn v. United States*, 524 U.S. 236 (1998).

STATUTORY PROVISION INVOLVED

Title 28 United States Code section 2244(d) provides in pertinent part:

> (d)(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(d)(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

Procedural History

After a jury trial, Petitioner Nathaniel Ottesen was convicted on one count of fleeing to elude a law enforcement officer and two counts of aggravated assault on a law enforcement officer. (App. 9-37). On those three counts, he was sentenced to a total term of imprisonment of ten years to be followed by 20 years of probation. (App. 9-37). Petitioner timely appealed. Petitioner's direct appeal concluded on September 27, 2000. His conviction became final for federal statute of limitation purposes 90 days later, which represents the time allowed for filing a petition for a writ of certiorari to this Court. 28 U.S.C. § 2244(d)(1)(A).

On July 26, 2001, Petitioner filed a *pro se* Motion to Correct Illegal Sentence pursuant to Florida Rule of Criminal Procedure 3.800(a) utilizing the "prison

mailbox" rule by delivering it to prison authorities for forwarding to the clerk of the State trial court.[1] In June 2002, the State trial court denied the Petitioner's Rule 3.800(a) motion. The Petitioner timely appealed his Rule 3.800(a) motion to the Second District Court of Appeal of Florida. On August 21, 2002, the Second District affirmed the trial court's denial of Petitioner's Rule 3.800(a) motion. *Ottesen v. State*, 827 So.2d 995 (Fla. 2nd DCA 2002). On September 12, 2002, the Second District issued the mandate on that affirmance.

The Petitioner filed a *pro se* motion for post-conviction relief in the trial court on August 18, 2002 pursuant to the "prison mailbox rule." The trial court denied the Petitioner's Rule 3.850 motion and he timely appealed that denial to the Second District Court of Appeal of Florida. That court affirmed the denial of the Petitioner's Rule 3.850 motion and issued its mandate on the Rule 3.850 proceeding on August 9, 2006. *State v. Nathaniel Ottesen*, 934 So.2d 462 (Fla. 2d DCA 2006).

On February 7, 2007, the Petitioner filed a *pro se* petition for writ of habeas corpus in the United States District Court for the Middle District of Florida (hereinafter "district court"). His petition was filed, at the most, 29 days late. (App. 38-40).

---

[1] *See e.g., Houston v. Lack*, 487 U.S. 266 (1988).

The district court dismissed the Petitioner's *pro se* habeas petition without prejudice for failure to file an affidavit setting forth relevant dates necessary for a determination of whether the petition was time-barred. The Petitioner, through newly retained counsel, responded by filing a Motion to Reopen the Case accompanied by an Affidavit executed by the Petitioner in which he set forth the relevant dates. The district court then entered an order declining to reopen the case on the basis that the relevant dates contained in the Petitioner's Affidavit demonstrated that his petition was time-barred. (App. 6-8). Subsequently, the Petitioner filed a Motion to Reconsider that Order (App. 38-51) in which he alleged that his Petition was not time-barred because the following procedural circumstances of this case warranted equitable tolling of the limitations period for habeas corpus petitions set forth in 28 U.S.C. § 2244(d)(1)(A) and 28 U.S.C. § 2244(d)(2).

In July 2006, seven months before Petitioner's federal habeas filing deadline, Petitioner retained a Florida attorney, Kevin Kulik, to ascertain his federal habeas filing deadline and file his federal habeas corpus petition pursuant to 28 U.S.C. § 2254. On July 24, 2006, Kulik wrote a letter to Petitioner telling him that the deadline for filing his Section 2254 petition had expired on December 26, 2001. (App. 47-51). In so concluding, Kulik misled Petitioner regarding his habeas filing deadline.

Kulik did not take into account that, under 28 U.S.C. § 2244(d)(2), Petitioner's Rule 3.800 motion to

correct illegal sentence filed on July 26, 2001 tolled the limitation period so that this motion, along with the subsequent filing of Petitioner's Rule 3.850 motion, resulted in the limitation period being tolled from July 26, 2001 until August 9, 2006 when the mandate issued on the Rule 3.850 proceeding. This failure by Kulik was an error of monumental proportion because Petitioner's Rule 3.800 motion tolled the limitation period for filing the federal habeas corpus petition and that period continued to be tolled until the mandate issued on the Rule 3.850 proceeding.

Thus, Petitioner hired Kulik well in advance of his habeas filing deadline but Kulik misled him by telling him in a letter that the one-year limitations period had expired when, in fact, at the time the letter was written, Petitioner still had over five months before that limitations period expired. Petitioner had no reason to doubt his attorney.

On May 8, 2007, the district court denied reconsideration of its order dismissing Petitioner's federal habeas corpus on the basis that "attorney negligence not a basis for equitable tolling." (App. 4).

Petitioner timely filed a notice of appeal from the district court's Order dismissing his federal habeas corpus petition.

On July 3, 2007, one Circuit Judge of the Eleventh Circuit issued a simple Order denying a certificate of appealability on the basis that Petitioner's habeas corpus petition was "barred by § 2244's one-year

statute of limitations" and that, as a consequence, the Petitioner failed to establish the element of *Slack v. McDaniel*, 529 U.S. 473 (2000) that reasonable jurors would find it debatable whether the District Court was correct in its procedural ruling. (App. 1).

REASONS FOR GRANTING THE PETITION

I. Certiorari should be granted to resolve the conflict between the Second, Third, Fifth, Eighth and Ninth Circuits on the one hand and the Seventh and Eleventh Circuits, on the other hand, over whether the statute of limitations governing federal habeas corpus claims of state prisoners should be equitably tolled where a state prisoner diligently attempts to comply with that statute of limitations but fails to do so because of his attorney's misconduct.

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (citations omitted). In *Pace*, this Court noted that "[w]e have never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations." 544 U.S. at 418 n.8. However, at least four Justices of this Court in *Duncan v. Walker*, 533 U.S. 167 (2001), expressed the view that

equitable tolling is applicable to AEDPA's statute of limitations. *See id.* at 183 (Stephens, J., joined by Souter, J., concurring) ("[N]either the Court's narrow holding, nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled . . . as a matter of equity."); *id.* at 192 (Breyer, J. joined by Ginsberg, J. dissenting) (describing the suggestion that courts employ equitable tolling under AEDPA as "sound"). The majority in *Duncan* did not deny that equitable tolling could apply; it merely stated that it had no occasion to address the issue. *See* 533 U.S. 181.

Eleven circuits have concluded that, under certain circumstances, equitable tolling of the statute of limitations in either 28 U.S.C. § 2255 for federal prisoners and/or 28 U.S.C. § 2244(d)(1) for state prisoners is possible. *See Neverson v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004); *Baldayaque v. United States*, 338 F.3d 145, 150-51 (2d Cir. 2003); *Miller v. N.J. State Dep't of Corrections*, 145 F.3d 616, 617-18 (3d Cir. 1998); *Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000); *United States v. Wynn*, 292 F.3d 226, 230-31 (5th Cir. 2002); *Dunlap v. United States*, 250 F.3d 1001, 1008-09 (6th Cir. 2001); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Calderon v. United States Dist. Court*, 128 F.3d 1283, 1288-89 (9th Cir. 1997); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir. 1999) (*per curiam*). The D.C. Circuit has yet to decide the question. *See*

United States v. Pollard, 416 F.3d 48, 56 n.1 (D.C. Cir. 2005).

The Second, Third, Fifth, Eighth and Ninth Circuits have held that an attorney's misconduct can equitably toll the AEDPA statute of limitations. *Spitsyn v. Moore*, 345 F.3d 796, 798 (9th Cir. 2003) (tolling AEDPA's statute of limitations applicable to state habeas corpus petitioner due to misconduct on the part of petitioner's attorney in failing to prepare and file a federal habeas corpus petition despite ample time to do so and in failing to comply with petitioner's request to return his file until after expiration of limitations period); *Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003) ("It is not inconsistent to say that attorney error *normally* will not constitute the extraordinary circumstances required to toll the AEDPA limitations period while acknowledging that at some point an attorney's behavior may be so incompetent as to render it extraordinary."); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002) (holding that petitioner's "allegation that he was deceived by his attorney into believing that a timely § 2255 motion had been filed on his behalf presents a rare and extraordinary circumstance beyond petitioner's control that could warrant equitable tolling of the statute of limitations" if petitioner reasonably relied on the attorney's misrepresentations); *United States v. Martin*, 408 F.3d 1089, 1092-95 (8th Cir. 2005) (holding that AEDPA's limitations period should be equitably tolled due to misconduct on the part of petitioner's attorney); *United*

States v. Martin, 408 F.3d 310, 320 (3d Cir. 2001) (court equitably tolled AEDPA's limitations period because petitioner's attorney misled petitioner about his habeas filing deadline). However, the Seventh Circuit in *Modrowski v. Mote*, 322 F.3d 965, 968-69 (7th Cir. 2003) rejected attorney misconduct as a basis for equitable tolling even if that misconduct is grossly negligent or willful. In addition, the Eleventh Circuit, in *Howell v. Crosby*, 415 F.3d 1250, 1252 (11th Cir. 2005) (citing *Sandvick v. United States*, 177 F.3d 1269 (11th Cir. 1999)), has held that "attorney negligence is not a basis for equitable tolling" of AEDPA's limitations period.

Petitioner contends that the Second, Third, Fifth, Eighth and Ninth Circuit Courts of Appeal have adopted the better reasoned view because they recognize that an attorney's misconduct, if it is sufficiently egregious, justifies the application of the doctrine of equitable tolling to the one-year limitations period of AEDPA.

The Eighth Circuit, in *Martin*, 408 F.3d at 1093-94, expressly acknowledged that there is a split among the Circuits on this issue. Since there is a conflict among the Circuits as to whether or not AEDPA's statute of limitations can be equitably tolled based upon attorney misconduct, this issue is ripe for review by this Court.

In the event that this Court grants this petition and holds that AEDPA's statute of limitations can be equitably tolled due to attorney misconduct, the

BEST AV

Petitioner contends that the District Court erred in ruling to the contrary and that the Eleventh Circuit erred in denying his Certificate of Appealability on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Miami, Florida
October 1, 2007

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-12145-J

NATHANIEL JEROME OTTESEN,

Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Jul. 05, 2007)

ORDER:

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel,* 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Because his petition is barred by § 2254's one-year statute of limitations, appellant has failed to satisfy the second prong of *Slack's* test. The motion for a

certificate of appealability, construed from the notice of appeal, is DENIED.

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NATHANIEL JEROME OTTSEN,

Petitioner,

Case No. 8:07-cv-319-T-26TGW

v.

SECRETARY,
Department of Corrections,

Respondent. /

ORDER

(Filed May 8, 2007)

Petitioner, through counsel, has filed a motion requesting the Court to reconsider its order of April 12, 2007, denying Petitioner's motion to reopen the case. After careful consideration of the motion, the Court is of the opinion that the motion is due to be denied.

The Court dismissed Petitioner's *pro* se petition without prejudice for failure to file an affidavit setting forth relevant dates necessary for a determination of whether the petition was time-barred.[1] Petitioner, through newly retained counsel, responded by filing a motion to reopen accompanied by an affidavit executed by Petitioner in which he set

[1] *See* docket 5.

forth the relevant dates.[2] The Court then entered an order declining to reopen the case because the relevant dates contained in his affidavit demonstrated that his petition was in fact time-barred.[3] Petitioner now seeks reconsideration of that order.

Petitioner, although questioning the amount of days his petition was filed late, concedes that even based on his calculations the petition is time-barred by at least 29 days. However, he attempts to avoid the time-bar by invoking the doctrine of equitable tolling in two respects. Petitioner first blames another retained counsel's misleading advice with regard to his federal habeas filing deadline for his failure to file a timely petition. Second, he asserts that he is raising a claim of "actual innocence" in ground one of his petition. As to the first contention, Eleventh Circuit precedent is clear: "attorney negligence is not a basis for equitable tolling[.]" *Howell v. Crosby*, 415 F.3d 1250, 1252 (11th Cir. 2005) (citing *Sandvik v. United States*, 177 F.3d 1269 (11th Cir. 1999); *Steed v. Head*, 219 F.3d 1298 (11th Cir. 2000) and *Helton v. Sec'y for the Dept of Corr.*, 259 F.3d 1310 (11th Cir. 2001)).

As to Petitioner's second contention, the Court observes that the underpinning for ground one is ineffective assistance of counsel not actual innocence. Moreover, to the extent ground one can be read to assert such a claim, the claim in reality has as its

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[2] *See* dockets 7 and 8.

[3] *See* docket 9.

focus the legal insufficiency of the evidence as opposed to factual innocence. The Eleventh Circuit recently discussed this distinction and reaffirmed its prior precedent that "[t]he actual innocence exception is exceedingly narrow in scope and requires proof of factual innocence, not just legal insufficiency." *Sharpe v. United States*, 2007 WL 86819 (2007) (citing *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001) and *Sawyer v. Holder*, 326 F.3d 1363, 1367 (11th Cir. 2003) (internal quotation marks omitted); *see also Tinker v. Moore*, 255 F.3d 1331, 1334 n.3 (11th Cir. 2001).

ACCORDINGLY, it is **ORDERED AND ADJUDGED** that for the reasons expressed, the Motion to Reconsider (Dkt. 10) is **denied**.

DONE AND ORDERED in Tampa, Florida, on May 8, 2007.

s/Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record
Petitioner, *pro se*

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NATHANIEL JEROME OTTSEN,

Petitioner,

Case No. 8:07-cv-319-T-26TGW

v.

SECRETARY, Department of Corrections,

Respondent. /

ORDER

(Filed April 12, 2007)

Ottesen's pro se petition for the writ of habeas corpus was dismissed (Doc. 5) because he failed to respond to the order (Doc. 4) directing him to provide specific dates necessary to determine whether the petition is time-barred. Ottesen, no longer pro se but represented by retained counsel, moves to reopen (Doc. 7) this case and in an affidavit (Doc. 8) he provides the relevant dates. Ottesen explains that he did not respond to the earlier order because he believed that his mother had retained counsel and that counsel would respond to the order. The case would be reopened if those were the only facts, but because the dates Ottesen provides show that the petition is time-barred, the motion to reopen will be denied.

BE

The Anti-Terrorism and Effective Death Penalty Act created a limitations period for petitions for the writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. . . ." 28 U.S.C. § 2244(d)(1)(A). Additionally, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

Because Ottesen's conviction became final on December 26, 2000,[1] his limitation period expired one year later, on December 26, 2001, absent tolling pursuant to 28 U.S.C. § 2244(d)(2). Ottesen allowed 225 days to elapse before he filed a state Rule 3.800 motion to correct illegal sentence on August 8, 2001. That proceeding remained pending, and the limitation period tolled, until the mandate issued on September 12,

[1] Ottesen represents that the direct appeal concluded on September 27, 2000. The conviction became final for federal statute of limitation purposes 90 days later, which represents the time allowed for filing a petition for the writ of *certiorari*, 28 U.S.C. § 2244(d)(1)(A). *See Bond v. Moore*, 309 F.3d 770 (11th Cir. 2002), and *Jackson v. Sec. Dept. Corr.*, 292 F.3d 1347 (11th Cir. 2002).

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2002. But Ottesen filed a Rule 3.850 motion for post-conviction relief the month before the mandate issued. Consequently, the limitation period remained tolled until July 19, 2006, when the mandate issued on the Rule 3.850 proceeding. Even liberally applying the "mailbox rule,"[2] Ottesen allowed 223 days to elapse before he filed his federal petition on February 7, 2007. Consequently, Ottesen allowed 448 (225 + 223 = 448) days to elapse, which makes his petition nearly three months too late (448 - 365 = 83).

ACCORDINGLY, it is **ORDERED AND ADJUDGED** that the motion to reopen (Doc. 7) is **DENIED**.

DONE AND ORDERED in Tampa, Florida, on April 12, 2007.

s/ Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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[2] The court is giving Ottesen the benefit of considering the petition filed as of the date Ottesen signed the petition. *Houston v. Lack*, 487 U.S. 266, 276 (1988) ("[T]he notice of appeal was filed at the time petitioner delivered it to the prison authorities for forwarding to the court clerk."), and *Adams v. United States*, 173 F.3d 1339, 1341 (11th Cir. 1999) (holding that a pro se prisoner's motion to vacate is deemed filed on the date it is delivered to prison authorities for mailing).

__ PROBATION VIOLATOR COMMUNITY CONTROL __ VIOLATOR	IN THE CIRCUIT COURT, 13TH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA DIVISION F
__ RETRIAL	CASE NUMBER 98-19186
__ RESENTENCE	OBTS NUMBER 0011734871

STATE OF FLORIDA
V.
OTTESON, NATHANIEL JEROME
DEFENDANT

----------JUDGMENT----------

(Filed Aug. 10, 1999)

THE DEFENDANT, OTTESON, NATHANIEL JEROME, BEING PERSONALLY BEFORE THIS COURT REPRESENTED WITH ASST PUBLIC DEFENDER GUY BROWN, THE ATTORNEY OF RECORD, AND THE STATE REPRESENTED BY ASST STATE ATTY: JENNIFER GABBARD, AND HAVING

__ BEEN TRIED AND FOUND GUILTY BY JURY/BY COURT OF THE FOLLOWING CRIME(S):

XX ENTERED A PLEA OF GUILTY TO THE FOLLOWING CRIME(S): 04

__ ENTERED A PLEA OF NOLO CONTENDERE TO THE FOLLOWING CRIME(S):

COUNT	CRIME	OFFENSE STATUTE NUMBER	DEGREE OF CRIME	COURT ACTION
01	AGGRA-VATED FLEEING TO ELUDE	3161935 3	2 F	JUGV
02	AGG ASSAULT ON LAW EN-FORCEME NT OFC	78407 2C	2 F	JUGV
03	AGG AS-SAULT ON LAW EN-FORCE-MENT OFC	78407 2C	2 F	JUGV
04	DRIVING W/LICENSE CANC/SUS P/ REVOKE	32234 1C	3 F	ADJG

XX AND NO CAUSE BEING SHOWN WHY THE DEFENDANT SHOULD NOT BE ADJUDICATED GUILTY, IT IS ORDERED THAT THE DEFENDANT IS HEREBY ADJUDICATED GUILTY OF THE ABOVE CRIME(S).

___ AND PURSUANT TO SECTION 943.325, FLORIDA STATUTES, HAVING BEEN CONVICTED OF ATTEMPTS OR OFFENSES RELATING TO SEXUAL BATTERY (CH. 794) OR LEWD AND LASCIVIOUS CONDUCT (CH.

800) THE DEFENDANT SHALL BE REQUIRED TO SUBMIT BLOOD SPECIMENS.

___ AND GOOD CAUSE BEING SHOWN: IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

___ THE FOLLOWING COUNT(S) NOLLE PROSSED:

___ THE FOLLOWING COUNT(S) DISMISSED:

___ THE FOLLOWING COUNT(S) NOT GUILTY:

___ THE FOLLOWING COUNT(S) ACQUITTED:

XX THE FOLLOWING COUNT(S) SENTENCED TO TIME SERVED: 04

STATE OF FLORIDA

VS.

[NATHANIEL JEROME OTTESEN] OTTESON, NATHANIEL
DEFENDANT

CASE NUMBER: 98-19186 F

FINGERPRINTS OF DEFENDANT

[Fingerprints Omitted In Printing]

Fingerprints taken by: Dep. B. Gonzalez 2215 Bailiff
NAME **TITLE**

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant, Nathaniel Jerome Ottesen, and that they were placed thereon by the defendant in my presence in open court this date.

DONE AND ORDERED in open court in Hillsborough County, Florida, this 10th day of August, 1999.

/s/ Chet [Illegible]
JUDGE

--------CHARGES/COSTS/FEES--------

THE DEFENDANT IS HEREBY ORDERED TO PAY THE FOLLOWING SUMS IF CHECKED:

XX $50.00 PURSUANT TO SECTION ~~960.20~~ 938.03(1), FLORIDA STATUTES (CRIMES COMPENSATION TRUST FUND).

XX $3.00 AS A COURT COST PURSUANT TO SECTION ~~943.25(3)~~ 938.01, FLORIDA STATUTES (CRIMINAL JUSTICE TRUST FUND).

___ $2.00 AS A COURT COST PURSUANT TO SECTION 943.25(13), FLORIDA STATUTES (CRIMINAL JUSTICE EDUCATION BY MUNICIPALITIES AND COUNTIES).

___ A FINE IN THE SUM OF $___ PURSUANT TO SECTION 775.0835, FLORIDA STATUTES. (THIS PROVISION REFERS TO THE OPTIONAL FINE FOR THE CRIMES COMPENSATION TRUST FUND AND IS NOT APPLICABLE UNLESS CHECKED AND COMPLETE FINES IMPOSED AS A PART OF A SENTENCE TO SECTION 775.083, FLORIDA STATUTES ARE TO BE RECORDED ON THE SENTENCE PAGE(S).).

___ $20.00 PURSUANT TO SECTION 939.015, FLORIDA STATUTES (HANDICAPPED AND ELDERLY SECURITY ASSISTANCE TRUST FUND).

___ A 10% SURCHARGE IN THE SUM OF $___ PURSUANT TO SECTION 775.0836, FLORIDA STATUTES (HANDICAPPED AND ELDERLY SECURITY ASSISTANCE TRUST FUND)

XX A SUM OF $200.00 PURSUANT TO SECTION ~~27.3455~~ 938.05(1)(A), FLORIDA STATUTES (LOCAL GOVERNMENT CRIMINAL JUSTICE TRUST FUND).

XX A SUM OF $150.00 PURSUANT TO SECTION ~~939.01~~ 938.27, FLORIDA STATUTES (PROSECUTION/INVESTIGATIVE COSTS).

___ A SUM OF $___ PURSUANT TO SECTION 27.56, FLORIDA STATUTES (PUBLIC DEFENDER FEES).

___ RESTITUTION IN ACCORDANCE WITH ATTACHED ORDER.

XX OTHER $150 COURT FACILITIES (FS #939-18)
$3 JUVENILE ASSESSMENT CENTER;
$3 TEEN COURT PROGRAM 938.17(2) 938.19(1)

DONE AND ORDERED IN OPEN COURT IN HILLSBOROUGH COUNTY, FLORIDA, THIS ___ DAY OF ___.

/s/ Chet [Illegible]
JUDGE

----------SENTENCE----------
(as to count 01)

THE DEFENDANT, BEING PERSONALLY BEFORE THIS COURT, ACCOMPANIED BY THE DEFENDANT'S ATTORNEY OF RECORD, WITH ASST PUBLIC DEFENDER GUY BROWN, AND HAVING BEEN ADJUDICATED GUILTY HEREIN, AND THE COURT HAVING GIVEN THE DEFENDANT AN OPPORTUNITY TO BE HEARD AND TO OFFER MATTERS IN MITIGATION OF SENTENCE, AND TO SHOW CAUSE WHY THE DEFENDANT SHOULD NOT BE SENTENCED AS PROVIDED BY LAW AND NO CAUSE BEING SHOWN

(CHECK ONE IF APPLICABLE)

~~xx~~ [MR] AND THE COURT HAVING ON ~~06/15/99~~ (DATE) DEFERRED IMPOSITION OF SENTENCE UNTIL THIS DATE

___ AND THE COURT HAVING PREVIOUSLY ENTERED A JUDGMENT IN THIS CASE ON _____ (DATE) NOW RESENTENCES THE DEFENDANT

___ AND THE COURT HAVING PLACED THE DEFENDANT ON _____ AND HAVING SUBSEQUENTLY REVOKED THE DEFENDANT'S _____

IT IS THE SENTENCE OF THE COURT THAT:

___ THE DEFENDANT PAY A FINE OF $_____, PURSUANT TO SECTION 775.083, FLORIDA STATUTES, PLUS $_____ AS THE 5% SURCHARGE REQUIRED BY SECTION 960.25, FLORIDA STATUTES.

XX THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS.

___ THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE SHERIFF OF HILLSBOROUGH COUNTY, FLORIDA.

___ THE DEFENDANT IS SENTENCED AS A YOUTHFUL OFFENDER IN ACCORDANCE WITH SECTION 958.04, FLORIDA STATUTES.

TO BE IMPRISONED (CHECK ONE; UNMARKED SECTIONS ARE INAPPLICABLE):

___ FOR A TERM OF NATURAL LIFE.

XX FOR A TERM OF 30 YEARS.

___ SAID SENTENCE SUSPENDED FOR A PERIOD OF _____ SUBJECT TO CONDITIONS SET FORTH IN THIS ORDER.

IF "SPLIT" SENTENCE, COMPLETE THE APPROPRIATE PARAGRAPH.

___ _____ UNDER SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF SUPERVISION SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

XX HOWEVER, AFTER SERVING A PERIOD OF 10 YEARS IMPRISONMENT IN STATE PRISON, THE BALANCE OF THE SENTENCE SHALL BE SUSPENDED AND THE DEFENDANT SHALL BE PLACED ON PROBATION FOR A PERIOD OF 20 YEARS UNDER SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF PROBATION SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

IN THE EVENT THE DEFENDANT IS ORDERED TO SERVE ADDITIONAL SPLIT SENTENCES, ALL INCARCERATION PORTIONS SHALL BE SATISFIED BEFORE THE DEFENDANT BEGINS SERVICE OF THE SUPERVISION TERMS.

---------- SPECIAL PROVISIONS ----------
(AS TO COUNT 01)

BY APPROPRIATE NOTATION, THE FOLLOWING PROVISIONS APPLY TO THE SENTENCE IMPOSED

MANDATORY/MINIMUM PROVISIONS:

FIREARM	___	IT IS FURTHER ORDERED THAT THE 3-YEAR MINIMUM IMPRISONMENT PROVISIONS OF SECTION 775.087(2), FLORIDA STATUTES, IS HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.
DRUG TRAFFICKING	___	IT IS FURTHER ORDERED THAT THE __ MANDATORY MINIMUM IMPRISONMENT PROVISIONS OF SECTION 893.135(1), FLORIDA STATUTES, IS HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.
CONTROLLED SUBSTANCE WITHIN 1000 FEET OF SCHOOL	___	IT IS FURTHER ORDERED THAT THE 3-YEAR MINIMUM IMPRISONMENT PROVISIONS OF SECTION 893.13(1)(E)1, FLORIDA STATUTES IS HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.
HABITUAL FELONY OFFENDER	XX	THE DEFENDANT IS ADJUDICATED A HABITUAL FELONY OFFENDER AND HAS BEEN SENTENCED TO AN EXTENDED TERM IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.084(4)(A), FLORIDA STATUTES. THE REQUISITE

		FINDINGS BY THE COURT ARE SET FORTH IN A SEPARATE ORDER OR STATED ON THE RECORD IN OPEN COURT.
HABITUAL VIOLENT FELONY OFFENDER	___	THE DEFENDANT IS ADJUDICATED A HABITUAL VIOLENT FELONY OFFENDER AND HAS BEEN SENTENCED TO AN EXTENDED TERM IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.084(4)(B), FLORIDA STATUTES. A MINIMUM TERM OF _____ MUST BE SERVED PRIOR TO RELEASE. THE REQUISITE FINDINGS OF THE COURT ARE SET FORTH IN A SEPARATE ORDER OR STATED ON THE RECORD IN OPEN COURT.
VIOLENT CAREER CRIMINAL	___	THE DEFENDANT IS ADJUDICATED A VIOLENT CAREER CRIMINAL OFFENDER AND HAS BEEN SENTENCED TO AN EXTENDED TERM IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.084(4)(C), FLORIDA STATUTES. A MINIMUM TERM OF _____ MUST BE SERVED PRIOR TO RELEASE. THE REQUISITE FINDINGS OF THE COURT

		ARE SET FORTH IN A SEPARATE ORDER OR STATED ON THE RECORD IN OPEN COURT.
HABITUAL FELONY SERIOUS JUVENILE OFFENDER	___	THE DEFENDANT/JUVENILE IS ADJUDGED A HABITUAL FELONY SERIOUS JUVENILE OFFENDER AND HAS BEEN SENTENCED AS A HABITUAL FELONY/SERIOUS JUVENILE OFFENDER IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.084(4)(A), F.S. OR SECTION 39.058, F.S.
LAW ENFORCEMENT PROTECTION ACT	___	IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL SERVE A MINIMUM OF _____ BEFORE RELEASE IN ACCORDANCE WITH SECTION 775.0823, FLORIDA STATUTES.
CAPITAL OFFENSE	___	IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL SERVE NO LESS THAN 25 YEARS IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.082(1), FLORIDA STATUTES.
SHORT-BARRELED RIFLE, SHOTGUN, MACHINE GUN	___	IT IS FURTHER ORDERED THAT THE 5-YEAR MINIMUM PROVISIONS OF ECTION 790.221(2), FLORIDA STATUTES, ARE HEREBY IMPOSED

FOR THE SENTENCE SPECIFIED IN THIS COUNT.

CONTINUING CRIMINAL ENTERPRISE ___ IT IS FURTHER ORDERED THAT THE 25-YEAR MINIMUM SENTENCE PROVISIONS OF SECTION 893.20, FLORIDA STATUTES ARE HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

---------- OTHER PROVISIONS ----------
(as to count 01)

BY APPROPRIATE NOTATION, THE FOLLOWING PROVISIONS APPLY ~~TO~~ THE SENTENCE IMPOSED

MANDATORY/MINIMUM PROVISIONS:

OTHER PROVISIONS:

RETENTION OF JURISDICTION ___ THE COURT RETAINS JURISDICTION OVER THE DEFENDANT PURSUANT TO SECTION 947.16(3), FLORIDA STATUTES (1983).

JAIL CREDIT XX IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL BE ALLOWED A TOTAL OF 199 DAYS AS CREDIT FOR TIME INCARCERATED BEFORE IMPOSITION OF THIS SENTENCE.

PRISON CREDIT	___	IT IS FURTHER ORDERED THAT THE DEFENDANT BE ALLOWED CREDIT FOR ALL TIME PREVIOUSLY SERVED ON THIS COUNT IN THE DEPARTMENT OF CORRECTIONS PRIOR TO RESENTENCING.
CONSECUTIVE/ CONCURRENT AS TO OTHER COUNTS	XX	IT IS FURTHER ORDERED THAT THE SENTENCE FOR THIS COUNT COUNT [SIC] SHALL RUN (CHECK ONE) ___ CONSECUTIVE TO XX CONCURRENT WITH THE SENTENCE SET FORTH IN THE FOLLOWING COUNT(S): 2 AND 3

----------SENTENCE----------

(as to count 02)

THE DEFENDANT, BEING PERSONALLY BEFORE THIS COURT, ACCOMPANIED BY THE DEFENDANT'S ATTORNEY OF RECORD, WITH ASST PUBLIC DEFENDER GUY BROWN, AND HAVING BEEN ADJUDICATED GUILTY HEREIN, AND THE COURT HAVING GIVEN THE DEFENDANT AN OPPORTUNITY TO BE HEARD AND TO OFFER MATTERS IN MITIGATION OF SENTENCE, AND TO SHOW CAUSE WHY THE DEFENDANT SHOULD NOT BE SENTENCED AS PROVIDED BY LAW AND NO CAUSE BEING SHOWN

(CHECK ONE IF APPLICABLE)

~~XX~~ [MR] AND THE COURT HAVING ON ~~06/15/99~~ (DATE) DEFERRED IMPOSITION OF SENTENCE UNTIL THIS DATE

___ AND THE COURT HAVING PREVIOUSLY ENTERED A JUDGMENT IN THIS CASE ON _____ (DATE) NOW RESENTENCES THE DEFENDANT

___ AND THE COURT HAVING PLACED THE DEFENDANT ON _____ AND HAVING SUBSEQUENTLY REVOKED THE DEFENDANT'S _____

IT IS THE SENTENCE OF THE COURT THAT:

___ THE DEFENDANT PAY A FINE OF $_____, PURSUANT TO SECTION 775.083, FLORIDA STATUTES, PLUS $_____ AS THE 5% SURCHARGE REQUIRED BY SECTION 960.25, FLORIDA STATUTES.

XX THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS.

___ THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE SHERIFF OF HILLSBOROUGH COUNTY, FLORIDA.

___ THE DEFENDANT IS SENTENCED AS A YOUTHFUL OFFENDER IN ACCORDANCE WITH SECTION 958.04, FLORIDA STATUTES.

TO BE IMPRISONED (CHECK ONE; UNMARKED SECTIONS ARE INAPPLICABLE):

___ FOR A TERM OF NATURAL LIFE.

XX FOR A TERM OF 30 YEARS.

— SAID SENTENCE SUSPENDED FOR A PERIOD OF _____ SUBJECT TO CONDITIONS SET FORTH IN THIS ORDER.

IF "SPLIT" SENTENCE, COMPLETE THE APPROPRIATE PARAGRAPH.

— _____ UNDER SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF SUPERVISION SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

XX HOWEVER, AFTER SERVING A PERIOD OF 10 YEARS IMPRISONMENT IN STATE PRISON, THE BALANCE OF THE SENTENCE SHALL BE SUSPENDED AND THE DEFENDANT SHALL BE PLACED ON PROBATION FOR A PERIOD OF 20 YEARS UNDER SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF PROBATION SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

IN THE EVENT THE DEFENDANT IS ORDERED TO SERVE ADDITIONAL SPLIT SENTENCES, ALL INCARCERATION PORTIONS SHALL BE SATISFIED BEFORE THE DEFENDANT BEGINS SERVICE OF THE SUPERVISION TERMS.

---------- SPECIAL PROVISIONS ----------
(AS TO COUNT 02)

BY APPROPRIATE NOTATION, THE FOLLOWING PROVISIONS APPLY TO THE SENTENCE IMPOSED

MANDATORY/MINIMUM PROVISIONS:

FIREARM	___	IT IS FURTHER ORDERED THAT THE 3-YEAR MINIMUM IMPRISONMENT PROVISIONS OF SECTION 775.087(2), FLORIDA STATUTES, IS HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COURT.
DRUG TRAFFICKING	___	IT IS FURTHER ORDERED THAT THE __ MANDATORY MINIMUM IMPRISONMENT PROVISIONS OF SECTION 893.135(1), FLORIDA STATUTES, IS HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.
CONTROLLED SUBSTANCE WITHIN 1000 FEET OF SCHOOL	___	IT IS FURTHER ORDERED THAT HE 3-YEAR MINIMUM IMPRISONMENT PROVISIONS OF SECTION 893.13(1)(E)1, FLORIDA STATUTES IS HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

HABITUAL FELONY OFFENDER	XX	THE DEFENDANT IS ADJUDICATED A HABITUAL FELONY OFFENDER AND HAS BEEN SENTENCED TO AN EXTENDED TERM IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.084(4)(A), FLORIDA STATUTES. THE REQUISITE FINDINGS BY THE COURT ARE SET FORTH IN A SEPARATE ORDER OR STATED ON THE RECORD IN OPEN COURT.
HABITUAL VIOLENT FELONY OFFENDER	___	THE DEFENDANT IS ADJUDICATED A HABITUAL VIOLENT FELONY OFFENDER AND HAS BEEN SENTENCED TO AN EXTENDED TERM IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.084(4)(B), FLORIDA STATUTES. A MINIMUM TERM OF _____ MUST BE SERVED PRIOR TO RELEASE. THE REQUISITE FINDINGS OF THE COURT ARE SET FORTH IN A SEPARATE ORDER OR STATED ON THE RECORD IN OPEN COURT.

VIOLENT CAREER CRIMINAL	___	THE DEFENDANT IS ADJUDICATED A VIOLENT CAREER CRIMINAL OFFENDER AND HAS BEEN SENTENCED TO AN EXTENDED TERM IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.084(4)(C), FLORIDA STATUTES. A MINIMUM TERM OF _____ MUST BE SERVED PRIOR TO RELEASE. THE REQUISITE FINDINGS OF THE COURT ARE SET FORTH IN A SEPARATE ORDER OR STATED ON THE RECORD IN OPEN COURT.
HABITUAL FELONY SERIOUS JUVENILE OFFENDER	___	THE DEFENDANT/JUVENILE IS ADJUDGED A HABITUAL FELONY SERIOUS JUVENILE OFFENDER AND HAS BEEN SENTENCED AS A HABITUAL FELONY/SERIOUS JUVENILE OFFENDER IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.084(4)(A), F.S. OR SECTION 39.058, F.S.
LAW ENFORCEMENT PROTECTION ACT	___	IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL SERVE A MINIMUM OF _____ BEFORE RELEASE IN ACCORDANCE WITH SECTION 775.0823, FLORIDA STATUTES.

CAPITAL OFFENSE	___	IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL SERVE NO LESS THAN 25 YEARS IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.082(1), FLORIDA STATUTES.
SHORT-BARRELED RIFLE, SHOT-GUN, MA-CHINE GUN	___	IT IS FURTHER ORDERED THAT THE 5-YEAR MINIMUM PROVISIONS OF SECTION 790.221(2), FLORIDA STATUTES, ARE HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.
CONTINUING CRIMINAL ENTERPRISE	___	IT IS FURTHER ORDERED THAT THE 25-YEAR MINIMUM SENTENCE PROVISIONS OF SECTION 893.20, FLORIDA STATUTES ARE HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

---------- OTHER PROVISIONS ----------
(as to count 02)

BY APPROPRIATE NOTATION, THE FOLLOWING PROVISIONS APPLY TO THE SENTENCE IMPOSED

MANDATORY/MINIMUM PROVISIONS:

OTHER PROVISIONS:

RETENTION OF JURISDICTION	___	THE COURT RETAINS JURISDICTION OVER THE DEFENDANT PURSUANT TO SECTION 947.16(3), FLORIDA STATUTES (1983).
JAIL CREDIT	XX	IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL BE ALLOWED A TOTAL OF 199 DAYS AS CREDIT FOR TIME INCARCERATED BEFORE IMPOSITION OF THIS SENTENCE.
PRISON CREDIT	___	IT IS FURTHER ORDERED THAT THE DEFENDANT BE ALLOWED CREDIT FOR ALL TIME PREVIOUSLY SERVED ON THIS COUNT IN THE DEPARTMENT OF CORRECTIONS PRIOR TO RESENTENCING.
CONSECUTIVE/ CONCURRENT AS TO OTHER COUNTS	XX	IT IS FURTHER ORDERED THAT THE SENTENCE FOR THIS COUNT COUNT [SIC] SHALL RUN (CHECK ONE) ___ CONSECUTIVE TO XX CONCURRENT WITH THE SENTENCE SET FORTH IN THE FOLLOWING COUNT(S): 1 AND 3

----------SENTENCE----------

(as to count 03)

THE DEFENDANT, BEING PERSONALLY BEFORE THIS COURT, ACCOMPANIED BY THE DEFENDANT'S ATTORNEY OF RECORD, WITH ASST PUBLIC DEFENDER GUY BROWN, AND HAVING BEEN ADJUDICATED GUILTY HEREIN, AND THE COURT HAVING GIVEN THE DEFENDANT AN OPPORTUNITY TO BE HEARD AND TO OFFER MATTERS IN MITIGATION OF SENTENCE, AND TO SHOW CAUSE WHY THE DEFENDANT SHOULD NOT BE SENTENCED AS PROVIDED BY LAW AND NO CAUSE BEING SHOWN

(CHECK ONE IF APPLICABLE)

~~XX~~ [MR] AND THE COURT HAVING ON ~~06/15/99~~ (DATE) DEFERRED IMPOSITION OF SENTENCE UNTIL THIS DATE

___ AND THE COURT HAVING PREVIOUSLY ENTERED A JUDGMENT IN THIS CASE ON _____ (DATE) NOW RESENTENCES THE DEFENDANT

___ AND THE COURT HAVING PLACED THE DEFENDANT ON _____ AND HAVING SUBSEQUENTLY REVOKED THE DEFENDANT'S _____

IT IS THE SENTENCE OF THE COURT THAT:

___ THE DEFENDANT PAY A FINE OF $_____, PURSUANT TO SECTION 775.083, FLORIDA STATUTES, PLUS $_____ AS THE 5% SURCHARGE REQUIRED BY SECTION 960.25, FLORIDA STATUTES.

XX THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS.

___ THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE SHERIFF OF HILLSBOROUGH COUNTY, FLORIDA.

___ THE DEFENDANT IS SENTENCED AS A YOUTHFUL OFFENDER IN ACCORDANCE WITH SECTION 958.04, FLORIDA STATUTES.

TO BE IMPRISONED (CHECK ONE; UNMARKED SECTIONS ARE INAPPLICABLE):

___ FOR A TERM OF NATURAL LIFE.

XX FOR A TERM OF 30 YEARS.

___ SAID SENTENCE SUSPENDED FOR A PERIOD OF _____ SUBJECT TO CONDITIONS SET FORTH IN THIS ORDER.

IF "SPLIT" SENTENCE, COMPLETE THE APPROPRIATE PARAGRAPH.

___ _____ UNDER SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF SUPERVISION SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

XX HOWEVER, AFTER SERVING A PERIOD OF 10 YEARS IMPRISONMENT IN STATE PRISON, THE BALANCE OF THE SENTENCE SHALL BE SUSPENDED AND THE DEFENDANT SHALL BE PLACED ON PROBATION FOR A PERIOD OF 20 YEARS UNDER SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF PROBATION SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

IN THE EVENT THE DEFENDANT IS ORDERED TO SERVE ADDITIONAL SPLIT SENTENCES, ALL INCARCERATION PORTIONS SHALL BE SATISFIED BEFORE THE DEFENDANT BEGINS SERVICE OF THE SUPERVISION TERMS.

---------- SPECIAL PROVISIONS ----------
(AS TO COUNT 03)

BY APPROPRIATE NOTATION, THE FOLLOWING PROVISIONS APPLY TO THE SENTENCE IMPOSED

MANDATORY/MINIMUM PROVISIONS:

FIREARM	___	IT IS FURTHER ORDERED THAT THE 3-YEAR MINIMUM IMPRISONMENT PROVISIONS OF SECTION 775.087(2), FLORIDA STATUTES, IS HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.
DRUG TRAFFICKING	___	IT IS FURTHER ORDERED THAT THE __ MANDATORY MINIMUM IMPRISONMENT PROVISIONS OF SECTION 893.135(1), FLORIDA STATUTES, IS HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.
CONTROLLED SUBSTANCE WITHIN 1000 FEET OF SCHOOL	___	IT IS FURTHER ORDERED THAT THE 3-YEAR MINIMUM IMPRISONMENT PROVISIONS OF SECTION 893.13(1)(E)1, FLORIDA STATUTES IS HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.
HABITUAL FELONY OFFENDER	XX	THE DEFENDANT IS ADJUDICATED A HABITUAL FELONY OFFENDER AND HAS BEEN SENTENCED TO AN EXTENDED TERM IN ACCORDANCE WITH THE PROVISIONS OF SECTION

775.084(4)(A), FLORIDA STATUTES. THE REQUISITE FINDINGS BY THE COURT ARE SET FORTH IN A SEPARATE ORDER OR STATED ON THE RECORD IN OPEN COURT.

HABITUAL VIOLENT FELONY OFFENDER	___	THE DEFENDANT IS ADJUDICATED A HABITUAL VIOLENT FELONY OFFENDER WHO HAS BEEN SENTENCED TO AN EXTENDED TERM IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.084(4)(B), FLORIDA STATUTES. A MINIMUM TERM OF _____ MUST BE SERVED PRIOR TO RELEASE. THE REQUISITE FINDINGS OF THE COURT HARE SET FORTH IN A SEPARATE ORDER OR STATED ON THE RECORD IN OPEN COURT.
VIOLENT CAREER CRIMINAL	___	THE DEFENDANT IS ADJUDICATED A VIOLENT CAREER CRIMINAL OFFENDER AND HAS BEEN SENTENCED TO AN EXTENDED TERM IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.084(4)(C), FLORIDA STATUTES. A MINIMUM TERM OF _____ MUST BE SERVED PRIOR TO RELEASE. THE REQUISITE FINDINGS OF THE

		COURT ARE SET FORTH IN A SEPARATE ORDER OR STATED ON THE RECORD IN OPEN COURT.
HABITUAL FELONY SERIOUS JUVENILE OFFENDER	___	THE DEFENDANT/JUVENILE IS ADJUDGED A HABITUAL FELONY SERIOUS JUVENILE OFFENDER AND HAS BEEN SENTENCED AS A HABITUAL FELONY/SERIOUS JUVENILE OFFENDER IN ACCORDANCE WITH THE PROVISIONS F SECTION 775.084(4)(A), F.S. OR SECTION 39.058, F.S.
LAW ENFORCE-MENT PROTECTION ACT	___	IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL SERVE A MINIMUM OF _____ BEFORE RELEASE IN ACCORDANCE WITH SECTION 775.0823, FLORIDA STATUTES.
CAPITAL OFFENSE	___	IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL SERVE NO LESS THAN 25 YEARS IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.082(1), FLORIDA STATUTES.
SHORT-BARRELED RIFLE, HOT-GUN, MA-CHINE GUN	___	IT IS FURTHER ORDERED THAT THE 5-YEAR MINIMUM PROVISIONS OF SECTION 790.221(2), FLORIDA STAT-UTES, ARE HEREBY IMPOSED

FOR THE SENTENCE SPECIFIED IN THIS COUNT.

CONTINUING CRIMINAL ENTERPRISE	___	IT IS FURTHER ORDERED THAT THE 25-YEAR MINIMUM SENTENCE PROVISIONS OF SECTION 893.20, FLORIDA STATUTES ARE HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

---------- OTHER PROVISIONS ----------
(as to count 03)

BY APPROPRIATE NOTATION, THE FOLLOWING PROVISIONS APPLY TO THE SENTENCE IMPOSED

MANDATORY/MINIMUM PROVISIONS:

OTHER PROVISIONS:

RETENTION OF JURISDICTION	___	THE COURT RETAINS JURISDICTION OVER THE DEFENDANT PURSUANT TO SECTION 947.16(3), FLORIDA STATUTES (1983).
JAIL CREDIT	XX	IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL BE ALLOWED A TOTAL OF 199 DAYS AS CREDIT FOR TIME INCARCERATED BEFORE IMPOSITION OF THIS SENTENCE.

PRISON CREDIT	___	IT IS FURTHER ORDERED THAT THE DEFENDANT BE ALLOWED CREDIT FOR ALL TIME PREVIOUSLY SERVED ON THIS COUNT IN THE DEPARTMENT OF CORRECTIONS PRIOR TO RESENTENCING.
CONSECUTIVE/ CONCURRENT AS TO OTHER COUNTS	XX	IT IS FURTHER ORDERED THAT THE SENTENCE FOR THIS COUNT COUNT [SIC] SHALL RUN (CHECK ONE) ___ CONSECUTIVE TO XX CONCURRENT WITH THE SENTENCE SET FORTH IN THE FOLLOWING COUNT(S): 1 AND 2
CONSECUTIVE/ CONCURRENT AS TO OTHER CONVICTIONS	XX	IT IS FURTHER ORDERED THAT THE COMPOSITE TERM OF ALL SENTENCES IMPOSED FOR THE COUNTS SPECIFIED IN THIS ORDER SHALL RUN (CHECK ONE) XX CONSECUTIVE TO ___ CONCURRENT WITH THE FOLLOWING (CHECK ONE) ___ ANY ACTIVE SENTENCE BEING SERVED. XX SPECIFIC SENTENCES: W/98-13127– RECEIVED FSP ON 6/1/99.

IN THE EVENT THE ABOVE SENTENCE IS TO THE DEPARTMENT OF CORRECTIONS, THE SHERIFF OF HILLSBOROUGH COUNTY, FLORIDA, IS HEREBY ORDERED AND DIRECTED TO DELIVER THE DEFENDANT TO THE DEPARTMENT OF CORRECTIONS AT THE FACILITY DESIGNATED BY THE DEPARTMENT TOGETHER WITH A COPY OF THIS JUDGMENT AND SENTENCE AN ANY OTHER DOCUMENTS SPECIFIED BY FLORIDA STATUTE.

THE DEFENDANT IN OPEN COURT WAS ADVISED OF THE RIGHT TO APPEAL FROM THIS SENTENCE BY FILING NOTICE OF APPEAL WITHIN 30 DAYS FROM THIS DATE WITH THE CLERK OF THIS COURT AND THE DEFENDANT'S RIGHT TO THE ASSISTANCE OF COUNSEL IN TAKING THE APPEAL AT THE EXPENSE OF THE STATE ON SHOWING OF INDIGENCY.

IN IMPOSING THE ABOVE SENTENCE, THE COURT FURTHER RECOMMENDS:

_____

_____

_____

DONE AND ORDERED IN OPEN COURT AT HILLSBOROUGH COUNTY, FLORIDA, THIS 10TH DAY OF AUGUST, 1999.

/s/ Chet [Illegible]
JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NATHANIEL JEROME OTTESEN,

Plaintiff,

vs.

JAMES R. McDONOUGH, Secretary, Department of Corrections, et al.,

Defendants. /

CASE NO. 8:07-cv-319-T-26TGW

MOTION TO RECONSIDER ORDER OF APRIL 12, 2007 DENYING PETITIONER OTTESEN'S MOTION TO REOPEN THIS CASE AND INCORPORATED MEMORANDUM OF LAW

Petitioner, NATHANIEL JEROME OTTESEN, through undersigned counsel, respectfully moves this Court to reconsider its Order of April 12, 2007 denying his motion to reopen this case.

In support of Mr. Ottesen's motion for reconsideration, he states as follows:

1. On March 22, 2007, this Court entered an Order dismissing Mr. Ottesen's *pro se* petition for a writ of habeas corpus because he did not respond to an earlier Order of this Court directing him to provide specific dates necessary to determine whether the petition was time-barred.

2. On April 11, 2007, Mr. Ottesen, no longer *pro se* but represented by retained counsel, moved to reopen this case and, in an affidavit, he provided the relevant dates. In that motion, Mr. Ottesen explained that he did not respond to the earlier order because he believed that his mother had retained counsel and that counsel would respond to the Order.

3. In the April 12, 2007 Order, this Court stated that "[t]he case would be reopened if those were the only facts, but because the dates Ottesen provides show that the petition is time-barred, the motion to reopen will he denied." In so ruling, this Court found that Petitioner Ottesen's habeas corpus petition was filed 83 days late.

4. However, as we will explain below, Petitioner Ottesen's habeas corpus petition was not filed 83 days late. Furthermore, equitable tolling of the one-year limitations period that governs habeas petitions filed pursuant to 28 U.S.C. § 2254 is warranted in this case.

5. The April 12, 2007 Order provides that, "Ottesen allowed 225 days to elapse before he filed a state Rule 3.800 motion to correct illegal sentence on August 8, 2001." However, in fact, Mr. Ottesen, a prisoner acting in a *pro se* capacity when he filed his state Rule 3.800 motion, filed his Rule 3.800 motion by delivering it to prison authorities for forwarding to the clerk of the state trial court on ***July 26, 2001***.

Therefore, under the "prison mailbox" rule, Mr. Ottesen filed his Rule 3.800 motion on July 26, 2001.[1] Thus, at most, Mr. Ottesen allowed 212 days to elapse before he filed his state Rule 3.800 motion.

6. In this Court's April 12, 2007 Order, this Court found that the limitations period remained tolled from the time Mr. Ottesen filed his Rule 3.800 motion until July 19, 2006 when the mandate issued on the Rule 3.850 proceeding. However, in this case, the mandate issued on the Rule 3.850 proceeding on August 9, 2006. *State v. Nathaniel Ottesen,* 934 So.2d 462 (Fla. 2d DCA 2006). This Court found in its April 12, 2007 Order that Mr. Ottesen's habeas corpus petition was filed in this court on February 7, 2007. Thus, 182 days elapsed between the date when the mandate issued on the Rule 3.850 proceeding (August 9, 2006) and Mr. Ottesen's filing of his federal habeas corpus petition in this Court. Consequently, a total of 394 (212 + 182 = 394) days elapsed which made his petition, at the most, 29 days late.

7. However, the following procedural circumstances of this case warrant equitable tolling of AEDPA's limitations period in this case:

In July 2006, seven months before Mr. Ottesen's federal habeas filing deadline, Mr. Ottesen retained a Florida attorney, Kevin Kulik, to ascertain his federal

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[1] *See e.g., Houston v. Lack,* 487 U.S. 266 (1988); *Haag v. State,* 591 So.2d 614, 617 (Fla. 1992); *Thompson v. State,* 76 So.2d 324, 326 (Fla. 2000); Fla.R.App.P. 9.420(a)(2).

habeas filing deadline and file his federal habeas corpus petition pursuant to 28 U.S.C. Section 2254. On July 24, 2006, Kulik wrote a letter to Mr. Ottesen telling him that the deadline for filing his Section 2254 petition had expired on December 26, 2001. A copy of this letter is attached hereto as Exhibit 1. In so concluding, Kulik misled Mr. Ottesen regarding his habeas filing deadline.

Kulik did not take into account that Mr. Ottesen's state Rule 3.800 motion to correct illegal sentence filed on July 26, 2001 tolled the limitation period so that this motion, along with the subsequent filing of Mr. Ottesen's Rule 3.850 motion, resulted in the limitation period being tolled from July 26, 2001 until August 9, 2006 when the mandate issued on the Rule 3.850 proceeding. This failure by Kulik was an error of monumental proportion because, as this Court recognized in its Order of April 12, 2007, page 2, the state Rule 3.800 motion tolled the limitation period and that period continued to be tolled until the mandate issued on the Rule 3.850 proceeding.

Thus, Mr. Ottesen hired Kulik well in advance of his habeas filing deadline but Kulik misled him by telling him in a letter that the one-year limitations period had expired when, in fact, at the time the letter was written, Mr. Ottesen still had over five months before that limitations period expired. Mr. Ottesen had no reason to doubt his attorney so he plainly should not be faulted for relying on his attorney. Under these circumstances, it certainly cannot be said that Mr. Ottesen was not diligent in

ascertaining the federal habeas filing deadline. *See United States v. Martin*, 408 F.3d 310, 320 (3d Cir. 2001) (court equitably tolled AEDPA's limitations period because petitioner's attorney misled petitioner about his habeas filing deadline). This is not a case where Mr. Ottesen has himself to blame for an untimely filing. Mr. Ottesen reasonably relied on attorney Kulik's representations. Thus, he is entitled to equitable tolling.

At least four Justices of the United States Supreme Court in *Duncan v. Walker*, 533 U.S. 167, 183 (2001), have expressed the view that equitable tolling is applicable to AEDPA's statute of limitations. Eleven circuits, including the Eleventh Circuit, have concluded that equitable tolling of the statute of limitations in either 28 U.S.C. § 2255 for federal prisoners and/or 28 U.S.C. § 2244(d)(1) for state prisoners is proper.[2] Indeed, the Eleventh Circuit in *Thompson v. Smith*, 173 Fed. Appx. 729 (11th Cir. 2006) (unpublished) and in *Knight v. Schofield*, 292

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[2] *See Neverson v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004); *Baldayaque v. United States*, 338 F.3d 145, 150-51 (2d Cir. 2003); *Miller v. N.J. State Dep't of Corrections*, 145 F.3d 616, 617-18 (3d Cir. 1998); *Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000); *United States v. Wynn*, 292 F.3d 226, 230-31 (5th Cir. 2002); *Dunlap v. United States*, 250 F.3d 1001, 1008-09 (6th Cir. 2001); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Calderon v. United States Dist. Court*, 128 F.3d 1283, 1288-89 (9th Cir. 1997); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir. 1999) (*per curiam*).

F.3d 709 (11th Cir. 2002) has applied equitable tolling to AEDPA's limitations period set forth in 28 U.S.C. Section 2244(d)(1) so as to enable state prisoners' untimely habeas petitions to be considered.

Numerous Courts have held that an attorney's misconduct can equitably toll the AEDPA statute of limitations. *E.g.*, *Spitsyn v. Moore*, 345 F.3d 796, 798 (9th Cir. 2003) (tolling AEDPA's statute of limitations applicable to state habeas corpus petitioner due to misconduct on the part of petitioner's attorney in failing to prepare and file a federal habeas corpus petition despite ample time to do so); *Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003) ("It is not inconsistent to say that attorney error ***normally*** will not constitute the extraordinary circumstances required to toll the AEDPA limitations period while acknowledging that at some point an attorney's behavior may be so incompetent as to render it extraordinary"); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002) (holding that petitioner's "allegation that he was deceived by his attorney into believing that a timely § 2255 motion had been filed on his behalf presents a rare and extraordinary circumstance beyond petitioner's control that could warrant equitable tolling of the statute of limitations" if petitioner reasonably relied on the attorney's misrepresentations); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001) (noting that claims of attorney misconduct may provide a basis for equitable tolling), *overruled on other grounds by Carey v. Saffold*, 536 U.S. 214 (2002).

Accordingly, because Mr. Ottesen's attorney misled him about his habeas filing deadline and Mr. Ottesen hired his attorney well in advance of his habeas filing deadline and had no reason to doubt his attorney, Mr. Ottesen is entitled to equitable tolling.

In addition, Mr. Ottesen's "actual innocence" is also a factor that helps to justify equitable tolling.[3]

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[3] *See, e.g., Sauter v. Jones*, 395 F.3d 577, 599-602 (6th Cir. 2005) ("equitable tolling of the one-year limitations period based on a credible showing of actual innocence is appropriate": "[F]ive years prior to the enactment of a federal statute of limitations, it was already well established that a procedural default resulting from an untimely filing could be excused by a federal habeas court 'where a constitutional violation has probably resulted in the conviction of one who is actually innocent.' . . . Absent evidence of Congress' contrary intent, there is no articulable reason for treating habeas claims barred by the federal statute of limitations differently. . . . [W]e conclude that against the backdrop of the existing jurisprudence and in the absence of evidence to the contrary, Congress enacted this new procedural limitation consistent with the *Schlup* actual innocence exception. . . . Furthermore, the inclusion of an actual innocence exception to the limitations provisions is consistent with the underlying principles of AEDPA. . . . Finally, we conclude that constitutional concerns counsel in favor of upholding equitable tolling based on a credible claim of actual innocence. Several courts have recognized that denying federal habeas relief from one who is actually innocent would be constitutionally problematic."; "we conclude that though Souter's habeas petition is time-barred, he has demonstrated a credible claim of actual innocence, such that he is entitled to equitable tolling and may proceed to argue the merits of his ineffective assistance of counsel and due process claims"); *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) ("[e]quitable tolling would be appropriate . . . when a prisoner is actually innocent"); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (indicating that court would

(Continued on following page)

More specifically, in Ground One of Mr. Ottesen's *pro se* Section 2254 petition, he asserted, *inter alia*, that a judgment of acquittal should have been entered on the aggravated fleeing to elude charge because the Information for that charge and the evidence admitted at trial failed to include and establish the essential element that a police officer engaged in a high speed pursuit in order to stop Mr. Ottesen's vehicle. Because Mr. Ottesen has alleged that he can show actual innocence, it was error to bar his first federal habeas petition as time-barred and it was an unconstitutional suspension of the writ of habeas corpus to do so without first determining whether Mr. Ottesen has made an adequate showing of actual innocence.

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not have denied equitable tolling if prisoner had "contend[ed] . . . that a constitutional violation has resulted in the conviction of one who is actually innocent"); *Garcia v. Portuondo*, 334 F.Supp.2d 446, 461 & n. 105, 462 (S.D.N.Y. 2004) ("running of the AEDPA statute of limitations is equitably tolled in the exceedingly rare case in which the petitioner makes out a credible claim of actual innocence"); *Wyzykowski v. Department of Corrections*, 226 F.3d 1213, 1218-19 (11th Cir. 2000) (recognizing that application of AEDPA's statute of limitations to bar filing of first habeas corpus petition by actually innocent petitioner "raises a troubling and difficult constitutional question" regarding "suspension of the writ of habeas corpus . . . because of the inherent injustice that results from the conviction of an innocent person, and the technological advances that can provide compelling evidence of a person's innocence," and remanding to district court to determine whether petitioner has made adequate "showing of actual innocence" and to analyze "the difficult Suspension Clause issue before tackling same ourselves" (footnote omitted)).

WHEREFORE, for all of the foregoing reasons, this Court should reconsider its Order of April 12, 2007 and enter a new Order requiring the Respondent to respond to Mr. Ottesen's equitable tolling/actual innocence claims, and thereafter consider the merits of Mr. Ottesen's Section 2254 petition.

Respectfully submitted,

s/ Marcia J. Silvers
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 7, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the United States Attorney's Office, Suite 3200, 400 North Tampa Street, Tampa, Florida 33602.

s/ Marcia J. Silvers
MARCIA J. SILVERS, ESQ.

July 24, 2006

Natham Ottesen, DC# 272562
Century Correctional Institution
400 Tedder Road – B1139S
Century, Florida 32535

Dear Mr. Ottesen:

Initially, I would like to apologize for a recent mix-up of information concerning the status of our investigation of your case. As requested, we have investigated and researched your case with an eye to the possibility of filing a petition for writ of habeas corpus in federal court with respect to your State criminal convictions in Hillsborough Circuit Case Number 98-19186. You originally related that you had hired an attorney within the time-limitation to file a federal habeas corpus petition, but that the attorney had failed to meet the federal deadline. We therefore originally began researching whether it would be possible to effect a change in federal case law which, up to the present time, holds that "attorney negligence is not a basis for equitable tolling [of the federal habeas time limitation], especially when the petitioner cannot establish his own diligence in ascertaining the federal habeas filing deadline." *Howell v. Crosby*, 415 F.3d 1250, 1250 (11th Cir.2005). *Accord Helton v. Secretary for the Dep't of Corr.*, 259 F.3d 1310 (11th Cir.2001). Having thoroughly investigated your case, however, it appears, for the reasons which follow, that, unless hired to file your federal habeas petition prior to December 26, 2001, the attorney contracted to file a federal habeas

corpus petition was not contracted until *after* the expiration of the applicable time limitation.

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This law amended 28 U.S.C. § 2244 by adding the following new subsection:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

> (2) The time during which a property filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)

The Judgment and Sentence were entered in your case August 10, 1999, and your direct appeal was affirmed *per curiam* without written opinion on September 27, 2000. Your conviction therefore became final on December 26, 2000. (ninety days after entry of the judgment). *See* Supreme Court Rule 13.3 ("[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate[.]"). Because all of these events occurred after the April 24, 1996 effective date of the AEDPA, you had precisely one year from the date that your case became final to file a federal habeas corpus petition (*i.e.*, until and including December 26, 2001). A federal petition for writ of habeas corpus would clearly be untimely if filed at any point after that date unless you could avail yourself of one of the provisions which extends or tolls the time period. The one-year period of limitations ran for considerably more than one year (from December 26, 2000, until August 18, 2002) until you filed your August 18, 2002, *pro se* motion for post conviction relief pursuant to Fla. R. Crim. P. 3.850.

Any motions filed after the expiration of the one-year period of limitations do not toll the time period because there is no period left to toll. "Under § 2244(d)(2), even 'properly' filed state-court petitions must be 'pending' in order to toll the limitations period. A state-court petition like [one under Rule 3.850] that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled." *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir.), *cert. denied*, 531 U.S. 991, 121 S.Ct. 481, 148 L.Ed.2d 454 (2000). *See also Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir.2001) (holding that, even though Florida law allows a prisoner two years to file a Rule 3.850 motion, the prisoner must actually have a properly filed Rule 3.850 motion *pending* within the one-year period in order to toll the federal limitation period), *cert. denied*, 534 U.S. 1144, 122 S.Ct. 1101, 151 L.Ed.2d 997 (2002). The fact that your State Rule 3.850 motion was not filed until after the one-year period of federal limitations had already expired forecloses the filing of a federal habeas corpus petition. Because the federal courts will see that you had ample time to exhaust State remedies and prepare and file a federal petition, the filing of such a petition would clearly be deemed frivolous and dismissed with prejudice pursuant to 28 U.S.C. § 2244(d).

This leaves you with only two possible avenues of relief: (a) an attack under Fla. R. Crim. P. 3.850(b)(1),[1] alleging newly discovered evidence which could not have been discovered by you or your attorney exercising due diligence, or (b) a new motion alleging your sentence is illegal under Fla. R. Crim. P. 3.800(a). Whereas the former route (newly discovered evidence) requires either good fortune, such as a new witness coming forward, or costly investigative work to uncover, the latter avenue of relief (showing that the sentence is illegal) can sometimes be discerned from the face of the record. The viability of such a motion, much like the viability of a federal habeas corpus petition, often depends on what grounds have or have not been raised earlier. Unfortunately, we have been unable to locate a copy of your *previous* motion to correct illegal sentence, which may determine whether it is possible to file another such motion on grounds we are now looking into.

Sincerely,

Kevin Kulik, Esquire

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[1] Rule 3.850(b)(1), Fla. R. Crim. P. provides for the filing of such a post-conviction relief motion outside of the otherwise customary time period where it can be shown that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence."